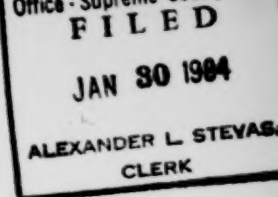


83-1271



No. _____

OCTOBER TERM, 1983

SUPREME COURT OF THE UNITED STATES

JOSEPH G. McDONAGH,
Petitioner,

v.

THE COMMONWEALTH OF MASSACHUSETTS,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT OF
THE COMMONWEALTH OF MASSACHUSETTS

Attorney of Record:

Richard Cole

85 Devonshire Street

Boston, Massachusetts 02109

Telephone: (617) 367-2880

Additional Counsel:

Mark Eckstein

Charles J. DiMare

Legal Services Office

922 Campus Center

University of Massachusetts

Amherst, Massachusetts 01003

Telephone: (413) 545-1995

QUESTION PRESENTED

Whether the petitioner was denied a meaningful opportunity to confront the witnesses against him, and was thus denied a fair trial in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution, when the trial judge refused to allow cross-examination of the arresting officers with respect to an alleged declaration by one of those officers that he was going to get rid of a witness statement that was favorable to the defendant.

TABLE OF CONTENTS

	<u>Page</u>
QUESTION PRESENTED	1
TABLE OF CONTENTS	2
TABLE OF AUTHORITIES	4
OPINIONS BELOW	5
JURISDICTION	6
CONSTITUTIONAL PROVISIONS	7
STATEMENT OF THE CASE	9
STATEMENT OF ADDITIONAL FACTS RELEVANT TO THIS PETITION	15
ARGUMENT	20
CONCLUSION	30
Appendix A, Order of the Supreme Judicial Court Denying Petitioner's Application for Leave to Obtain Further Appellate Review	1a
Appendix B, Unpublished Order and Opinion of the Appeals Court	3a
Appendix C, Judgment of the Appeals Court	12a
Appendix D, Transcript of Relevant <u>Voir Dire</u> Testimony of Officer Draghetti	13a

Appendix E, Transcript of Relevant <u>Voir Dire</u> Testimony of Officer Williamson	16a
Appendix F, Portion of Transcript in Which Trial Judge Excluded the Proffered Cross-Examination of Officer Draghetti	24a
Appendix G, Portion of Transcript in Which Trial Judge Excluded the Proffered Cross-Examination of Officer Williamson	26a

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Commonwealth v. Frey,</u> 390 Mass. 245 (1983)	23
<u>Commonwealth v. Moreira,</u> 388 mass. 596 (1983)	26
<u>Davis v. Alaska,</u> 415 U.S. 308 (1974)	21, 22, 29
<u>Douglas v. Alabama</u> 380 U.S. 415 (1965)	20
<u>Mattox v. United States</u> 156 U.S. 237 (1895)	20, 21
<u>Pointer v. Texas</u> 380 U.S. 400 (1965)	20, 22
<u>Smith v. Illinois</u> 390 U.S. 129 (1968)	20

OPINIONS BELOW

The denial by the Supreme Judicial Court for the Commonwealth of Massachusetts, of the Petitioner's Application for Further Appellate Review, not yet reported, appears in the Appendix hereto. No opinion was issued in conjunction with said denial. The decision by the Appeals Court for the Commonwealth of Massachusetts, affirming the judgments in the Superior Court, is reported at 16 Mass. App.Ct. 1110, and appears in the Appendix hereto. The opinion of the Appeals Court, issued in conjunction with the decision affirming the judgments, has not been reported, but appears in the Appendix hereto.

JURISDICTION

The judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts was entered on December 1, 1983. This petition for certiorari was filed within 60 days of that date. This Court's Jurisdiction is invoked under 28 U.S.C. §2101(d) and Rule 20 of the Revised Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defence.

United States Constitution, Amendment XIV

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the

United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner was arraigned in the District Court, Hampshire Division, on March 10, 1980, on charges of being a disorderly person, and of assault and battery on one Thomas Patrick, an Institutional Protection Man (i.e., a security guard not having the power to arrest) at the University of Massachusetts at Amherst. On or about March 13, 1980, Petitioner filed a request with the Public Safety Department at the University of Massachusetts at Amherst, seeking an internal investigation regarding the circumstances of his arrest, and alleging various acts of police misconduct. Shortly thereafter, the charges in the District Court were dismissed with prejudice, but only after the Petitioner was indicted in the Superior Court,

Hampshire Division, on charges of assault and battery on Officer David Williamson by means of a dangerous weapon, to wit, a foot shod with a sneaker, in violation of Massachusetts General Laws (hereinafter G.L.), c. 265, §15A; of assault and battery on Officer Williamson, in violation of G.L. c. 265, §13D; of assault and batter on Officer Steven Draghetti, in violation of G.L. c. 265, §13D; and of being a disorderly person, in violation of G.L. c. 272, §53. Trial on these indictments commenced on October 21, 1981.

At a pre-trial motion session, a voir dire examination was conducted of Officer Draghetti and Officer Williamson out of the jury's presence. Officer Draghetti testified that approximately a week after the incident, he was sit-

ting in a police cruiser with Officer Williamson. According to Officer Draghetti, Officer Williamson showed Officer Draghetti a witness statement written by Marshall Weinberg. After reading the statement, Officer Draghetti expressed to Officer Williamson that it was highly critical of the conduct of the guards on the night in question. Officer Williamson then informed Officer Draghetti that he intended to get rid of the statement. Appendix, pp. 13a - 15a.

Officer Williamson testified that he had no such conversation with Officer Draghetti. Officer Williamson claimed that the witness statement in question was read aloud to other officers in the police station, and that another officer remarked how the statement was critical of the conduct of the police officers.

Officer Williamson twice emphatically denied that he ever stated an intention to get rid of the witness statement.

Appendix, pp. 16a - 23a.

Another voir dire examination was conducted of Officer Draghetti during the trial. During this examination, Officer Draghetti repeated his testimony regarding the statement by Officer Williamson of that officer's intention to get rid of a witness statement.

After this voir dire examination, Petitioner's counsel attempted to cross-examine both officers regarding the alleged declaration of Officer Williamson, but was denied any inquiry into the subject by the trial judge. Trial Transcript, pp. 2-70 to 2-71, 2-165 to 2-166. Appendix, pp. 24a - 27a.

Petitioner moved for a Required

Finding of Not Guilty on each of the indictments at the close of the Commonwealth's case, which motions were denied. Petitioner renewed these motions at the close of all evidence, and the Court again denied each one. Verdicts of Not Guilty were returned on the charges of assault and battery with a dangerous weapon on Officer Williamson and of assault and battery on Officer Draghetti. The jury found Petitioner guilty of assault and battery on Officer Williamson and of being a disorderly person. The Court imposed sentence of one year's probation together with a requirement that Mr. McDonagh perform 100 hours of public service on the two guilty verdicts, and the Petitioner timely filed his appeal to the Appeals Court of the Commonwealth of Massachusetts. The issue of the

petitioner's right to cross-examine the officers regarding Officer Williamson's statement, as it affected his rights, inter alia, under the Sixth and Fourteenth Amendments to the United States Constitution, was briefed and argued.

The Appeals Court affirmed the judgments entered in the Superior Court.

Appendix, p. 12a. The Decision of the Appeals Court was entered on October 12, 1983.

The Petitioner then timely filed an Application for Leave to Obtain Further Appellate Review with the Supreme Judicial Court of the Commonwealth of Massachusetts, in which the issue of the right to cross-examine was again raised. The Supreme Judicial Court denied the Petitioner's Application on December 1, 1983. Appendix, p. 1a.

STATEMENT OF ADDITIONAL FACTS

RELEVANT TO THIS PETITION

Petitioner, Joseph McDonagh, was arrested on March 9, 1980, outside the Blue Wall Club, located in the Murray D. Lincoln Campus Center at the University of Massachusetts at Amherst. There was conflicting testimony at the trial concerning the reason for Mr. McDonagh being taken into custody. Steven Draghetti, the arresting officer, testified that he placed Mr. McDonagh under arrest as a disorderly person. Mr. McDonagh testified that the officer told him that he was being taken into protective custody (more commonly referred to as being "p.c.'d").¹

¹/ Under G.L. c. 111B, §8, an individual may, rather than being charged with a crime when he or she is drunk, be assisted by a police officer to his or her residence, to a detoxifica-

Other witnesses also testified that they heard the term "protective custody" being used at the time Mr. McDonagh was being led out of the Campus Center, or that the officer stated he was placing Mr. McDonagh under protective custody. Shortly before Mr. McDonagh was taken into custody, there had been an incident inside the Blue Wall in which the same Officer Draghetti was physically attacked and severely beaten while arresting an extremely unruly patron. Shortly after Mr. McDonagh was taken into custody, there was another battle involving Offi-

tion facility, or to a police station, and thus be placed in protective custody. Before someone may be so assisted, however, he or she must be both intoxicated and incapacitated. The term incapacitated is defined as "the condition of an intoxicated person who, by reason of the consumption of intoxicating liquor is (1) unconscious, (2) in need of medical attention, (3) likely to suffer or cause physical harm or damage property, or (4) disorderly." G.L. c. 111B, §3.

cer Draghetti, Officer Williamson, I.P.M. Patrick, Mr. McDonagh, and other officers and civilians. There was conflicting testimony as to the way in which the altercation began. Officer Draghetti testified that Mr. McDonagh attempted to free himself from custody with a "hip-check," that Officer Draghetti responded with necessary force to subdue Mr. McDonagh, that Mr. McDonagh then became unreasonably forceful, thereby escalating matters into a brawl where it was necessary for other officers to assist in subduing the Petitioner. Mr. McDonagh testified that it was Officer Draghetti who initiated the brawl with the use of unreasonable and unnecessary force, that he, Mr. McDonagh, was only trying to convince Officer Draghetti that it was not necessary to take Mr. McDonagh into protective

custody, and that he, Mr. McDonagh, did nothing that required the use of force, and that if Mr. McDonagh used any force against the officers, he was acting only in self-defense.

There was additional conflicting testimony concerning where Officer Draghetti was coming from when he first approached the Petitioner; concerning whether the officer asked Mr. McDonagh to leave the area twice before handcuffing him or just walked up to him and immediately handcuffed him; concerning whether or not Officer Draghetti took Mr. McDonagh to the floor before leading him outside of the Campus Center concourse; and concerning the nature of the physical altercation that ensued, who was involved in such altercation, at what point such parties became involved, and the activi-

ties of the crowd.²

In short, the nature and extent of the conflicting testimony elevated the issue of credibility to one of extreme importance.

^{2/} Petitioner states that this is an accurate accounting of the nature of the discrepancies in the testimony, and states further that even should Respondent contest its accuracy, direct references to the transcript are unnecessary, as discrepancies in testimony did exist, and their exact nature is unimportant to the substance of this Petition.

ARGUMENT

It is clear that the right of a criminal defendant to confront his accusers, as embodied in the Sixth Amendment to the United States Constitution, is a fundamental right which includes the right of effective cross-examination. Mattox v. United States, 156 U.S. 237, 242-3 (1895); see also cases cited in Pointer v. Texas, 380 U.S. 400 (1965), at 407. This rule has been made applicable to a state prosecution, under the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 403 (1965); Douglas v. Alabama, 380 U.S. 415, 418 (1965); Smith v. Illinois, 390 U.S. 129, 133 (1968).

The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, . . . being used against the prisoner in lieu of . . . cross-examination of the witness in which the accused has an opportunity, not only of test-

ing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Mattox v. United States, 156 U.S. at 242, 243.

In order to effectively test the believability of a witness, this Court has held that

[a] more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices or ulterior motives of the witness as they may relate directly to the issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is "always relevant as discrediting the witness and affecting the weight of his testimony." Davis v. Alaska, 415 U.S. 308, 316 (1974), quoting 3A J. Wigmore, Evidence §940, p. 775 (Chadbourn, rev. 1970).

Thus, even where cross-examination in other areas is permitted, if a defendant

is denied the opportunity to follow a line of inquiry on cross-examination which would expose such biases, prejudices or ulterior motives, the defendant is effectively denied "one of the safeguards essential to a fair trial," Pointer v. Texas, 380 U.S. at 404, quoting Mr. Justice Stone in Alford v. United States, 282 U.S. 687, 692, and is "constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." Davis v. Alaska, 415 U.S. at 318, citing Smith v. Illinois, 390 U.S. 129, 131, quoting from Brookart v. Janis, 384 U.S. 1, 3.

The Appeals Court held that if the testimony sought by Petitioner on cross-examination of Officers Williamson and Draghetti "had any tendency toward demonstrating bias that would affect the officer's testimony at trial, it was slight

indeed." The Court held further that the jury heard ample other evidence of the officers' bias, and thus that the exclusion of the testimony in question was proper. The Appeals Court relied on the holding in Commonwealth v. Frey, 390 Mass. 245, 251 (1983) in support of this proposition. The Petitioner contends, however, that the reliance on such holding was error, and was based on mistaken conclusions of fact.

In Frey, supra, the defendant, after having been convicted of, inter alia, non-forcible rape of a child, complained of the exclusion of evidence of the complainant having had three sexual encounters prior to her first encounter with him. Among the points raised by the defendant in Frey, supra, was that this evidence would tend to show that the complainant

was motivated to charge him falsely and was biased against him.

The Supreme Judicial Court held that under those circumstances, especially where there was additional evidence of strong influence on the complainant by her father, and of animosity between the defendant and the complainant's father, the proffered evidence was of little, if any, value in establishing such bias.

In contrast, the defendant in the instant case did not have the opportunity to present such "ample evidence of the complainant's bias and motive to lie," and in fact was prohibited from introducing the majority of such evidence. Furthermore, the fact that one officer testified that the other officer intended to dispose of a witness statement, and the other officer denied having made that statement, was highly relevant to the

issue of the credibility of those two police officers, whose testimony was crucial to the conviction of the Petitioner.

The Appeals Court held that the other facts in evidence tending to show the officers' bias were that:

1. "The jury heard testimony that Officer Draghetti's police report requested the issuance of only two complaints in the District Court."

2. "They had knowledge that after the defendant had requested an internal investigation of the conduct of the officers. . . the defendant was indicted on other charges, one of which was more serious than mentioned in the report."

3. "They had heard testimony that a civil action had been brought against the police in the United States District Court."

It is interesting that the Appeals

Court found that the jury heard much of the evidence which the Petitioner attempted to introduce, but which was excluded by the trial judge. It was contended by Petitioner at trial that Officer Draghetti originally took Mr. McDonagh into protective custody without making any determination that Mr. McDonagh was intoxicated, that Mr. McDonagh's resistance, whether passive or aggressive, to being placed in custody was thus justified where there was no probable cause, Commonwealth v. Moreira, 388 Mass. 596, 601 (1983), and that the ensuing fracas was a result of the wrongful actions of the police officers. It was contended further that the jury should be informed of the sequence of events in the prosecution of Mr. McDonagh, namely that he was originally charged in the District Court with two misdemeanors, and, only after he

filed a request for an internal investigation of the conduct of the police officers during his arrest, was he indicted in Superior Court on more serious charges.

Although the jury did hear testimony that the police officers were defendants in a civil suit brought by Mr. McDonagh in the United States District Court, the defendant was not allowed to introduce any evidence connecting that lawsuit to the prosecution of Mr. McDonagh or to Mr. McDonagh's request for an internal investigation of the conduct of the police officers. Nor was the Petitioner allowed to introduce any evidence as to the chronological connection between the filing by Mr. McDonagh of the request for an internal investigation and the indictment of Mr. McDonagh on charges more serious than those with which he was originally

charged. Nor was the jury apprised of the substance of Mr. McDonagh's request for an internal investigation or its connection to Mr. McDonagh's arrest. Nor did the jury hear any evidence regarding "District Court." Although the jury did hear that the police officers did not allege in their reports the commission of three of the four crimes for which Mr. McDonagh was being tried, the defendant was not allowed to introduce any evidence of comparison of the District Court and Superior Court.

Thus, especially under these circumstances, the conflicting testimony of the police officers, with regard to one of those officers threatening to dispose of evidence favorable to Petitioner, was crucial to a fair determination of all the facts by the jury.

"[D]efense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witnesses." Davis v. Alaska, 415 U.S. at 318, and "the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on [the officers'] testimony which provided 'a crucial link in the proof of petitioner's act.'" Davis v. Alaska, 415 U.S. at 317, quoting Douglas v. Alabama, 380 U.S. at 419.

The holdings of the Appeals Court and of the Supreme Judicial Court have thus decided a federal question in a way in conflict with applicable decisions of this Court.

CONCLUSION

For the reasons stated in this
Petition, a writ of certiorari should
issue to review the judgments of the
State Courts.

Respectfully submitted,

RICHARD COLE
85 Devonshire Street
Boston, Massachusetts 02109
Telephone: (617) 367-2880

Mark Eckstein
Charles J. DiMare
Legal Services Office
922 Campus Center
University of Massachusetts
Amherst, Massachusetts 01003
Telephone: (413) 545-1995

Date: January 30, 1984

No. _____

OCTOBER TERM, 1983

SUPREME COURT OF THE UNITED STATES

JOSEPH G. McDONAGH,
Petitioner,

v.

THE COMMONWEALTH OF MASSACHUSETTS,
Respondent

APPENDIX TO PETITION
FOR A WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT OF
THE COMMONWEALTH OF MASSACHUSETTS

Attorney of Record:

Richard Cole
85 Devonshire Street
Boston, Massachusetts 02109
Telephone: (617) 367-2880

Additional Counsel

Mark Eckstein
Charles J. DiMare
Legal Services Office
922 Campus Center
University of Massachusetts
Amherst, Massachusetts 01003
Telephone: (413) 545-1995

APPENDIX A

1a

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT FOR THE COMMONWEALTH
AT BOSTON,

December 1, 1983

ORDER

It is hereby ORDERED, that the following Applications for Further Appellate Review are denied:

M-2859 COMMONWEALTH vs. JEFFREY P. STRUCK

Hampden Superior Court 78-2749
Appeals Court 83-191

Motion to File Application
for Review Late Allowed.

M-2860 COMMONWEALTH vs. JOSEPH G. McDONAGH

Hampshire Superior Court
14896, 14898
Appeals Court 83-114

M-2861 FINBERG MANUFACTURING CO., INC. vs. JOSEPH CARTER
Bristol Superior Court 10787
Appeals Court 82-770

M-2864 COMMONWEALTH vs. ROBERT M. PABON

Suffolk Superior Court 035956
Appeals Court 83-209

M-2865 COMMONWEALTH vs. JAMES M. REDDY

Boston Municipal Court 824671,
824672
Appeals Court 83-354

By the Court,

/s/

Clerk

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

NO. 83-114

COMMONWEALTH

vs.

JOSEPH G. McDONAGH.

ORDER

After a jury trial extending into a seventh day, the report of which covers over one thousand pages of transcript, the defendant was acquitted on indictments charging assault and battery by means of a dangerous weapon (a shod foot) on David R. Williamson and assault and battery on a police officer (Steven Draghetti). He was convicted on indictments charging that he was a disorderly person and assault and battery on Officer Williamson.

He has appealed from those convic-

tions claiming errors which we summarize as: (1) the exclusion from evidence of copies of two complaints filed in a District Court against the defendant; (2) the exclusion of the contents of a complaint the defendant filed with the Public Safety Department of the University of Massachusetts at Amherst (Public Safety complaint); (3) the refusal of the court to permit cross-examination of Draghetti and Williamson (both of whom were police officers employed by the University of Massachusetts, Amherst, at the time of the incident) concerning a matter which he claims would demonstrate that these officers were biased when they testified at trial; and (4) the judge's charge to the jury on protective custody was "unclear." We consider each claim separately.

As to issues (1) and (2), the defen-

dant in his brief argued that his right to cross-examine the two officers to show bias was improperly restricted by the exclusion of evidence concerning the District Court complaints and the contents of the Public Safety complaint. The defendant's theory of bias, expressed to the trial judge, was that the officers chose to dismiss the original District Court complaints and seek indictments against the defendant in retaliation for the defendant's filing both the Public Safety complaint and a civil rights suit in a Federal district court. At the outset, we assume without deciding that the defendant properly objected to the exclusions.

(1) A party is entitled to reasonable cross-examination to show bias. Commonwealth v. Hicks, 377 Mass. 1, 8 (1979). However, where the materiality of the

evidence is not apparent, a party is required to explain to the trial judge how the proffered evidence will demonstrate bias. Commonwealth v. Cheek, 374 Mass. 613, 615 (1978). The District Court complaints were not filed by Draghetti and Williamson, nor was any evidence offered, other than speculation, that connected those officers with the dismissal of the complaints and the later indictments against the defendant. In this posture, there was no evidence offered or anticipated which would demonstrate bias. Id.

(2) While permitting the cross-examination of the officers on the existence of the Public Safety complaint and the officers' awareness that the complaint requested an investigation of their conduct, the trial judge was acting within her

discretion in excluding the contents of the complaint, which was replete with self-serving assertions against unnamed "arresting" officers. Cf. Commonwealth v. Ahern, 370 Mass. 283, 287 (1976) (reversible error where judge totally excluded inquiry on cross-examination for purpose of showing bias).

(3) In the course of his cross-examination of Officer Draghetti, the defendant asked for and was granted a voir dire as to questions he intended to put to the officer. On this voir dire, Officer Draghetti testified that several days after the incident, he and Officer Williamson had a conversation during which Williamson showed Draghetti a "witness statement" of one Weinberg. (Weinberg later testified at trial.) After reading the "statement" Draghetti

told Williamson that "it did not look good for the guards" (These guards were security personnel, not police officers). Officer Williamson said he was going to get rid of the statement. We are told that the statement was in fact given to defense counsel pursuant to a pretrial request. Officer Draghetti did not inform his superiors of Williamson's proposed action. Counsel was asked by the judge how the conduct of the officers "established bias." Counsel responded that it established the bias of Williamson. The court excluded the testimony on that point, indicating that she would rule on the proffered evidence later should it be brought up during Williamson's testimony. When it was brought up during Williamson's testimony, it was excluded.

If the proffered testimony had any tendency toward demonstrating bias that would affect the officer's testimony at trial, it was slight indeed. The jury had heard testimony that Officer Draghetti's police report requested the issuance of only two complaints in the District Court. They had knowledge that after the defendant had requested an internal investigation of the conduct of the officers during the incident the defendant was indicted on other charges, one of which was more serious than mentioned in the report. Also, they had heard testimony that a civil action had been brought against the police in the United States District Court. As the Supreme Judicial Court recently stated, "[f]urthermore, even if the evidence could be considered marginally probative, ample evidence of the

complainant's bias and motive to lie was presented to the jury." Commonwealth v. Frey, 390 Mass. 245, 251 (1983). That is the case here. See Commonwealth v. Baker, 368 Mass. 58, 77 (1975).

(4) The judge was also requested to charge the jury on "protective custody." G.L. c. 111B, §8, as amended by St. 1979, c. 597, §1. As there was some evidence that at the time of the incident the defendant was told he was being taken into such custody, the judge agreed and did charge on this point. The defendant requested her to charge ". . . that in order to lawfully place one in protective custody the officer must first conduct certain field tests to determine sobriety." This the judge declined to do. At the conclusion of the charge, the defendant's counsel raised the judge's failure to

charge on the matter of a "test," but counsel does not appear to have objected to that failure; he apparently had concluded that while a test may be given it was not required. Counsel was correct. General Laws c. 111B, § 8, 1st par., permits, but does not require, such a test. The judge's charge on protective custody correctly stated the law.

Therefore, upon consideration of the appendix, briefs, transcript and oral argument under the provisions of Rule 1:28 of this court, it is ordered that the following entry be made on the docket of the Superior Court Department:

Judgments affirmed.

By the Court (Hale, C.J.,
Greaney & Smith, JJ.)

/s/

Assistant Clerk

Entered: October 12, 1983

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT FOR THE COMMONWEALTH
AT BOSTON, October 12, 1983.

In the case of

COMMONWEALTH

vs.

JOSEPH G. McDONACH

pending in the Superior
Court for the County of Hampshire

ORDERED, that the following entry be
made in the docket; viz.,--

Judgments affirmed.

BY THE COURT,

/s/, CLERK

October 12, 1983.

[TESTIMONY OF OFFICER DRAGHETTI]

Q Now do you remember the date that you and Officer Williamson were in this police cruiser and you first saw the Marshall Weinberg statement?

A No, I don't.

Q Do you know where the cruiser was parked?

A No.

Q Were you and Officer Williamson on a team at that time, both on duty?

A Yes. We were assigned to the same car.

Q Same car, working together?

A That's correct.

Q Did Officer Williamson first show you the statement or did you show him the statement?

A No, he showed me the statement.

Q You're sitting in the car --

A Correct.

Q What did he do in regards to that

statement?

A He showed me the statement. I don't know whether he had it in his folder of things.

Q To the best of your memory, when he showed you the statement, what did he say to you?

A Probably something like, "Read this."

Q And did you read the statement?

A Yes, I did.

Q Upon reading the statement, what did you say to him?

A I said, "It doesn't look too good for the guards."

THE COURT: It doesn't look too good for the what?

THE WITNESS: For the guards.

THE COURT: For the guards?

THE WITNESS: Correct.

Q By "guard," what do you mean?

- A The security guards at UMass.
- Q Which security guards in particular?
- A It didn't mention any security guards in particular, just security guards.
- Q Do you have an opinion as to which guards were involved?
- A From the statement, no.
- Q You said to him, "It doesn't look too good for the guards." And what did Officer Williamson say in response?
- A He said he was going to get rid of it.
- Q He said he was going to get rid of the statement?
- A Yes.
- Q Do you remember his exact words?
- A I asked him, "What are you going to do with it?" He said, "I'm going to get rid of it."

[TESTIMONY OF OFFICER WILLIAMSON]

But what I do remember is that particular night that statements were taken back to the police department. And, you know, they were being read out loud in the police department.

Q How do you know that they were in the police department?

A I saw them personally.

Q Where did you see them in the police department?

A Well I know at one point in time I had them in my hands.

Q And they were being read out loud by whom?

A I'm not exactly sure if I was reading them out loud or another officer was reading them out loud. I think I might have been. And there were a group of officers there that were all listening.

Q Do you know what officers were there at that time?

A Do I know what other officers were there?

Q Yes.

A I know a few of their names.

Q Will you please state those names?

A Officer Draghetti was present; Officer David Grader was present.

THE COURT: What is that name?

THE WITNESS: David Grader.

THE COURT: Grader?

THE WITNESS: Yes.

THE COURT: Okay.

A Sergeant Shearer was there at that time. I've been told by Officer Grader that Officer Warren was there at that time. But, you know, I don't recall specifically if he was there. And there were another two officers in the

area at the time, but I don't recall who they were.

Q Approximately what time was this in the evening?

A I'm not sure. Sometime between 7:30 and 11, 11:30.

Q And that's on the same day that you took the statements or the next day.

A Again, I think it's the same day I took it, but I'm not sure.

Q Did you read the total statements, can you recall?

A I remember reading both statements. But out loud? I specifically remember reading two or three passages, because everyone was laughing and joking about them.

Q Laughing and joking?

A Yes.

Q What were they saying about them?

A Specifically the passage that described one of the officers at the scene that night, an officer with a blue shirt and protruding belly and slick-back hair -- you know, everyone was laughing at this, it was about a particular officer.

Q They were joking about that particular officer?

A Yes.

Q That is an officer on the University police force?

A I believe the statements were meant to describe Sergeant Shearer.

Q What other comments were made that evening by other officers after you read the statements?

A After the statements were read? I recall one of the officers saying, "That statement doesn't look that good for the cops."

[TESTIMONY OF OFFICER WILLIAMSON]

Q Do you recall having any conversations with Officer Draghetti relative to these statements?

A No.

Q None whatsoever?

A None.

Q Do you recall being in a police cruiser with Officer Draghetti discussing these statements?

A Discussing the statements themselves, no.

Q Do you recall whether or not, on the evening that you previously spoke about, you showed Officer Draghetti these statements?

A I might have shown a number of officers the statements that night in the station house, but I don't recall at a later point in time ever showing

them to any officer.

Q But you had copies of the statements, isn't that correct?

A I made copies of them.

Q What did you do with the copies of the statements?

A I put one on the Sergeant's desk, whether it be the original or the copy I made; the other one I'm not sure if I kept it myself or put it in another box.

Q You just don't know what happened to it?

A I'm not sure, no.

Q And you don't recall having a conversation with Officer Draghetti in a police cruiser about the statements?

A No.

Q Did you ever state to Officer Draghetti that you were going to get rid of the statements?

A No.

Q Are you positive of that?

A Absolutely.

Q At any time?

A No.

Q You know that you never said that?

A I don't recall saying that or think that I would ever say anything like that.

[TESTIMONY OF OFFICER WILLIAMSON]

Q Again, very briefly, can you recall ever saying to any officer that you were going to get rid of these witness statements?

A Absolutely not.

Q You're sure of that?

A Absolutely, yes.

[PORTION OF DISCUSSION HELD AT SIDE BAR]

MR. BAUMOHL: I'm just trying to establish that he had an affirmative duty to report this conversation to his superiors, your Honor, and that in fact he did not.

THE COURT: How does that establish bias in this particular case?

I am not going to allow those questions.

MR. DIMARE: Your Honor, clearly it establishes, from our viewpoint, bias of Officer Williamson.

THE COURT: May I say at this point that it is my intention now to exclude this line of questioning.

MR. DIMARE: Even after Officer Williamson testifies?

THE COURT: Officer Williamson isn't a defendant in this case. I'm

going to exclude it at the present time in this case, in this cross-examination, because I don't find at this point that it's relevant, and I don't think it's necessarily establishing bias. We're going into a completely collateral issue and we aren't going to try out that matter here. So that's now being excluded.

MR. BAUMOHL: Okay. Our exception is noted?

THE COURT: Sure.

[PORTION OF DISCUSSION HELD AT SIDE BAR]

MR. DIMARE: At this point in time we would like to start getting into questions about conversations he had with Officer Draghetti concerning a week after the incident when he allegedly stated and showed Officer Draghetti Marshall Weinberg's statement.

THE COURT: This is the same matter on which we had the voir dire the other day?

MR. DIMARE: That's correct.

THE COURT: No, I'm going to deny it at this point. I don't need another voir dire for your offer of proof. You can use the hearing on the voir dire.

MR. DIMARE: Okay.

THE COURT: I am not going to allow that question.

MR. DIMARE: Should I make another offer of proof at this point in time?

THE COURT: No. At this point you don't have to, because I'm stating for the record that the information that was the testimony that was given at the offer of proof the other day is sufficient, and you may use that.

MR. DIMARE: And that's incorporated herein by reference?

THE COURT: That will be incorporated.

Side bar discussion concluded.)